

UNITED STATES MILITARY COMMISSION  
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA  v.  KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	<b>D-108</b>  Prosecution Special Request for Relief- Extension of Time to File a Response to D- 108: A Defense Motion to Preserve CIA Black Sites  <b>Order</b>
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1. On 20 April 2009, the detailed defense counsel for Mr. bin al Shibh filed a motion seeking a Military Commission order directing the government to “preserve Central Intelligence Agency (CIA) Detention Facilities Used to Detain High-Value Detainees.” In the alternative, the detailed defense counsel for Mr. bin al Shibh moves for an order directing the U.S. Government to “videotape, photograph, diagram, inventory and otherwise record said facilities prior to their dispositions.” The Rules of Court require that, unless the Military Judge provides otherwise, the government’s response is due on 27 April 2009.<sup>1</sup> On 23 April 2009, the prosecution filed a special request for relief seeking an extension of time to file its response to 26 May 2009. Given the sensitive nature of the defense request, the Commission agrees an extension is necessary in order for the prosecution to coordinate a response with multiple Government agencies with an interest in the subject matter of the motion.

2. The special request for relief is hereby GRANTED, in part. The government response to D-108, Defense Motion to Request a Court Order Directing the Government to Preserve Central Intelligence Agency (CIA) Detention Facilities Used to Detain High-

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<sup>1</sup> Rule 3.6.b.(1), of the Military Commissions Trial Judiciary Rules of Court, provides that, unless the military judge provides otherwise, a response to a motion is due within 7 days after a motion is received.

Value Detainees", is due 20 May 2009. The Government will preserve the status quo with respect to these facilities until the Military Commission rules on the defense motion.

3. The Commission directs that a copy of this order be served upon the prosecution and all defense counsel of record, and that it be provided to the Clerk of Court for public release. D-108, the underlying defense motion, along with the government special request for relief, will be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations. The Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above named accused.

So Ordered this 26<sup>th</sup> day of April, 2009:

/s/  
Stephen R. Henley  
Colonel, U.S. Army  
Military Judge

UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMED, WALID  
MUHAMMAD SALIH MUBARAK BIN  
'ATTASH, RAMZI BIN AL SHIBH, ALI  
ABDUL AZIZ ALI, MUSTAFA AHMED  
ADAM AL HAWSAWI

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**Defense Motion**

to Request a Court Order Directing the  
Government to Preserve Central Intelligence  
Agency (CIA) Detention Facilities Used to  
Detain High-Value Detainees

20 April 2009

1. **Timeliness:** This motion is timely and filed pursuant to R.M.C. 906(a). This motion is in response to Central Intelligence Agency (CIA) Director Leon Panetta's recent public announcement that he has directed the CIA to cease the secret detention of prisoners at overseas detention facilities ("black sites") and planned the decommissioning of said sites. There is no docketing order in effect in this case.<sup>1</sup>

2. **Relief Sought:** Mr. Ramzi bin al Shibh respectfully requests an order directing the Government to preserve CIA detention facilities used to detain high value detainees, said facilities more commonly known as "Black Sites," and all fixtures, instrumentalities and other equipment used in those facilities. In the alternative, the Mr. bin al Shibh moves for an order directing the Government to videotape, photograph, diagram, inventory, and otherwise record said facilities prior to their dispositions.

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<sup>1</sup> The Defense does not waive, and hereby continues to reserve, the right to raise further motions challenging the constitutionality of provisions of the Military Commissions Act, including provisions pertaining to the admissibility of certain evidence; jurisdiction over Defendants; and other procedural defects. The Defense does not waive and continues to reserve the right to supplement this Motion based on the government's response and receipt of discovery materials and additional information.

3. **Overview:** Although it is dated, February 14, 2007, the International Committee of the Red Cross (ICRC) report entitled *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody*, was only recently released to the public. (Attachment A). The report indicates that Mr. bin al Shibh was arrested in Karachi, Pakistan, on September 11, 2002 and was purportedly transferred to the custody of the United States on September 14, 2002; however, he did not arrive to Guantanamo Bay until around September 6, 2006, when then President George W. Bush announced that Mr. bin al Shibh had been transferred. Thus, it is apparent that Mr. bin al Shibh was held under some U.S. control at multiple, unknown locations, presumably for questioning by way of enhanced interrogation techniques, for approximately four years.

According to CIA Director Panetta's April 9, 2009, statement to agency employees, the Director has indicated that CIA "no longer operates detention facilities or black sites and has proposed a plan to decommission the *remaining* sites." [Emphasis added.] (Attachment B) This was not an off the cuff remark, rather it was a prepared statement for agency employees. It is noteworthy that Director Panetta used the phrase "remaining sites." Such a careful sentence structure and choice of words seems to indicate that there were other such black sites that have already been decommissioned by CIA. One can only conclude that these decommissioned sites have already been abandoned by CIA and therefore have not been preserved by CIA for evidentiary value.

CIA has just recently admitted to the purposeful destruction of at least ninety-two videotapes of interrogations and observations of prisoners in its black sites. (Attachment C). Had the Accused known that the CIA possessed these videotapes and intended to destroy them, the Accused would have demanded their preservation.

The Government has indicated its' desire to seek the death penalty against the accused. Evidence of the conditions of his prior confinement is relevant to assess the reliability of any of his statements. Further, such evidence is relevant to assist medical and mental health experts to determine the affect confinement and mistreatment at said sites presently has on Accused's ability to assist counsel in his defense. Such evidence is also relevant for mitigation purposes if this case continues to proceed as a capital case. Based upon previous misconduct by the CIA, it is imperative for an order to issue directing the CIA to preserve the buildings, equipment used to interrogate the Accused

4. **Burden and Standard of Proof:** The Government shall disclose to the defense all known exculpatory evidence. *See* R.M.C. 701(e). As the existence and relevance of the "Black Sites" are known to both parties, the burden is on the Government to demonstrate why it should be permitted to dismantle or destroy exculpatory evidence without reasonably preserving it for production in discovery.

5. **Facts:**

i.

[REDACTED]

ii. It is also alleged in the ICRC report that accused was

[REDACTED]

iii.

[REDACTED]

[REDACTED]

iv. [REDACTED]

6. **Law and Argument:**

I. **WHEN THE GOVERNMENT, IN BAD FAITH, FAILS TO PRESERVE POTENTIALLY EXCULPATORY EVIDENCE, THE GOVERNMENT DEPRIVES THE ACCUSED OF DUE PROCESS**

Under the Due Process Clause, the Supreme Court has developed “what might loosely be called the area of constitutionally guaranteed access to evidence.” *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532 (1984). In accordance with this guaranty, a defendant has a “constitutionally protected privilege to . . . obtain from the prosecution evidence that is . . . material to the guilt of the defendant.” *Id.* at 485. Under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), moreover, the suppression of material exculpatory evidence violates a defendant's due process rights, irrespective of the good faith or bad faith of the prosecution. *Id.* at 87. “To meet the standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *Trombetta*, 467 U.S. at 488-89; *see generally*, *Kyles v. Whitley*, 514 U.S. 419, 436, 115 S.Ct. 1555 (1995) (materiality of nondisclosed evidence is determined “collectively, not item-by-item.”)

In *Arizona v. Youngblood*, 109 S. Ct. 333, 337, 109 S.Ct. 333 (1988), the Supreme Court required a defendant to show bad faith on the part of a police officer in a case where potentially exculpatory evidence was lost. “The presence or absence of bad faith turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or

destroyed.” *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993). The same standard applies where the government fails to *collect* the evidence. *Miller v. Vasquez*, 868 F.2d at 1120-21 (“We hold that a bad faith failure to collect potentially exculpatory evidence would violate the due process clause.”)

The law is clear, therefore, that the government is under a duty, pursuant to the Due Process Clause, to preserve and collect evidence material to the defense and that “might be expected to play a significant role in the suspect's defense.” *Trombetta*, 467 U.S. at 488-89. In the present case, the Government has already demonstrated bad faith in destroying ninety-two videotapes. (Attachment C) Without the Commission’s intervention to preserve the black sites in question here, the Government has indicated an explicit intent to continue destroying the “remaining” black sites. (Attachment B) The exculpatory value of the evidence is apparent, for it will undermine confidence in the outcome of the case whether this evidence is made available. *See United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985) (finding *Brady* violation occurs if absence of the evidence in question “undermine[s] confidence in the outcome of the trial,” which can occur if “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”); *see also*, *Kyles*, 514 U.S. at 434 (“The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.”)

The evidence in question here is explicitly within the control of the U.S. Government, as shown by the Director of the Central Intelligence Agency’s acknowledgment that he developed a plan for “decommissioning” the sites. If the Commission does not intercede to ensure preservation of this evidence, Mr. bin al Shibh will have no other reasonable means of obtaining

comparable evidence: the locations of these sites, their appearance, what they contain, has all been classified at the top secret level, such that only the government is at liberty to preserve them. If they are destroyed, therefore, it would be impossible for Mr. bin al Shibh to re-create them as he pursues his defense. The government is on notice that Mr. bin al Shibh seeks to preserve this evidence (Attachment D); it would be further acting in bad faith if it proceeds to destroy these sites.

## **II. GOVERNMENT'S FAILURE TO PRESERVE EXCULPATORY OR MITIGATION EVIDENCE IN A CAPITAL CASE VIOLATES THE HEIGHTENED RELIABILITY REQUIRED IN THIS CONTEXT**

The Government is seeking the death penalty against Mr. bin al Shibh, and yet, continues to destroy evidence or fail to preserve it. The Supreme Court has emphasized that "heightened reliability" is essential during death penalty proceedings due to the finality of the result. *See Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long, [thus] ... there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). To achieve this heightened degree of reliability, "the Supreme Court has also made clear that ... *more* evidence, not less, should be admitted on the presence or absence of aggravating and mitigating factors." *United States v. Fell*, 360 F.3d 135, 143 (2d Cir.2004), citing *Gregg v. Georgia*, 428 U.S. 153, 203-04, 96 S.Ct. 2909 (1976) ("We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision"); *see also Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733 (1983) ("What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime."). In the context of this capital prosecution, therefore, for a constitutionally adequate trial and sentencing to take place, it



is imperative that the black sites, all fixtures, instrumentalities and other equipment used in those facilities, be preserved. *See Brady*, 373 U.S. at 87 (“the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”) Should the evidence at issue here not be preserved, there is a reasonable probability that the outcome of this case will have been affected, in violation of due process. *See generally, Bagley*, 473 U.S. at 682.

7. **Request for Oral Argument:** Pursuant to an Order of the Commission granting the Government’s motion, this case has been continued until 20 May 2009. *See* Order, P-009, dated 21 January 2009. The case remains pending before the Military Judge, however, and it therefore remains within that Judge’s authority to ensure preservation of material, exculpatory evidence in the case. As this matter requires the immediate attention of the Military Judge for purposes of such preservation, the defense waives its right to oral argument.

8. **Request for Witnesses:** None.

9. **Conference with Opposing Counsel:** Pursuant to R.C. 3.3, the Defense conferred with the Prosecution on 17 April. The Prosecution responded that it will need further time to determine its position regarding this motion.

10. **Attachments:**

- A. ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody, dated February 14, 2007

- B. Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the CIA's Interrogation Policy and Contracts, dated April 9, 2009
- C. Letter from Mr. Sean Lane and Peter M. Skinner, Assistant United States Attorneys to Hon. Alvin K. Hellerstein, Judge, U.S. District Court for the Southern District of New York, dated March 2, 2009 at 2.
- D. Letter from Richard Coughlin, Federal Public Defender (D.NJ) and Candace Hom, Assistant Federal Public Defender (D.NJ) to Leon E. Panetta, Director, Central Intelligence Agency, submitted 17 April 2009.

Respectfully submitted,

By: 

CDR SUZANNE LACHELIER, JAGC, USNR

LT RICHARD FEDERICO, JAGC, USN

*Detailed Defense Counsel for*

*Ramzi Bin al Shibh*

Office of the Chief Defense Counsel

Office of Military Commissions

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# ATTACHMENT A

REDACTED-  
CONFIDENTIAL/  
NOT RELEASE  
AUTHORITY

# **ATTACHMENT B**

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# Message from the Director: Interrogation Policy and Contracts

**Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the CIA's Interrogation Policy and Contracts**

**April 9, 2009**

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As you know, there is continuing media and congressional interest in reviewing past rendition, detention, and interrogation activities that took place dating back to 2002. I have also been asked about contract interrogators and detention facilities. Today, I sent a letter to our Congressional oversight committees outlining the Agency's current policy regarding interrogation of captured terrorists, including the policy on the use of contractors in the process.

- CIA's aggressive global pursuit of al-Qaida and its affiliates continues undiminished. Agency officers are working tirelessly—and successfully—to disrupt operations in strict accord with the President's Executive Order of January 22, 2009, concerning detention and interrogation.
- CIA officers, whose knowledge of terrorist organizations is second to none, will continue to conduct debriefings using a dialog style of questioning that is fully consistent with the interrogation approaches authorized and listed in the Army Field Manual. CIA officers do not tolerate, and will continue to promptly report, any inappropriate behavior or allegations of abuse. That holds true whether a suspect is in the custody of an American partner or a foreign liaison service.
- Under the Executive Order, the CIA does not employ any of the enhanced interrogation techniques that were authorized by the Department of Justice from 2002 to 2009.
- No CIA contractors will conduct interrogations.
- CIA no longer operates detention facilities or black sites and has proposed a plan to decommission the remaining sites. I have directed our Agency personnel to take charge of the decommissioning process and have further directed that the contracts for site security be promptly terminated. It is estimated that our taking over site security will result in savings of up to \$4 million.
- CIA retains the authority to detain individuals on a short-term transitory basis. None have occurred since I have become Director. We anticipate that we would quickly turn over any person in our custody to U.S. military authorities or to their country of jurisdiction, depending on the situation.

CIA's focus will remain where the American people expect it to be—on the mission of protecting the country today and into the future. We will do that even as we cooperate with Congressional reviews of past interrogation practices. Officers who act on guidance from the Department of Justice—or acted on such guidance previously—should not be investigated, let alone punished. This is what fairness and wisdom require.

CIA will continue to honor the law as we defend the United States as we have done since the beginning of this program. That is what the men and women of this Agency demand. Together, we can, and will, do no less. Thank you for your service and dedication to protecting this nation.

Finally, let me take this opportunity to wish you and your families a Happy Easter and Passover.

Leon E. Panetta

- Privacy
- Copyright
- Site Policies
- USA.gov
- FOIA
- DNI.gov
- NoFEAR Act

# ATTACHMENT C

REDACTED  
FOUO

# **ATTACHMENT D**



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FEDERAL PUBLIC DEFENDER

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**CHESTER M. KELLER**  
FIRST ASSISTANT

April 20, 2009

Leon E. Panetta  
Director, Central Intelligence Agency  
Central Intelligence Agency  
Washington, D.C. 20505

Re: Request to Preserve CIA Detention Facilities Used  
to Detain High-Value Detainees - A.K.A. "Black Sites"

Dear Mr. Panetta:

We are habeas counsel for Ramzi Bin Al-Shibh. Mr. Bin Al-Shibh is currently detained at Guantanamo Bay Naval Base. He has been there since September 2006. He was arrested in September 2002, and until 2006, he was incarcerated in the secret prison facilities run by the Central Intelligence Agency (CIA).

It has been publicly acknowledged and reported that Mr. Bin Al-Shibh was subjected to enhanced interrogation techniques (EIT), while in the custody of the CIA. According to the publicly released report from the International Committee of the Red Cross (ICRC) which was dated February 14, 2007, and entitled *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody*, Mr. Bin Al-Shibh was subjected to incredibly harsh treatment while in the custody of the CIA.

According to that report, while in CIA custody, Mr. Bin Al-Shibh was forced to stand with his wrists shackled to a bar in the ceiling for prolonged periods of time - extending to several days - and was deprived of solid food for three to four weeks. Many of the prisoners the ICRC interviewed did not want their names used in the report. As such, though the ICRC report lists much more cruel, degrading and inhuman treatment, the report is not specific as to what additional treatment was inflicted on Mr. Bin Al-Shibh while held in the CIA's "black" sites.

Throughout that time, he was not able to communicate with his family, a lawyer or anyone. Effectively, the CIA "disappeared" him for four years and subjected him to EIT beyond the eyes of the world.

The CIA and other government agencies also admitted to the purposeful destruction of at least ninety-two video tapes of interrogations and observations of prisoners in its black sites.

Had Mr. Bin Al-Shibh known that the CIA possessed these video tapes and intended to destroy them, he would have demanded their preservation. However, neither he, his lawyers nor the courts learned of the CIA's plan until after the tapes had been destroyed and now they are forever gone.

In light of the destruction of video taped evidence and the newly released report from the ICRC describing horrific treatment, we noted with interest your message to CIA personnel on April 9, 2009, in which you stated that the CIA would be "decommissioning" the CIA secret facilities.

Although we welcome your decision to cease the secret detention and mistreatment of prisoners of the United States Government, we are concerned that the CIA intends to actually destroy the sites - including the buildings and the equipment used to interrogate Mr. Bin Al-Shibh - before Mr. Bin Al-Shibh has had the opportunity to fully investigate his conditions of confinement. We write to avoid the destruction of more evidence - namely the actual secret facilities themselves.

Mr. Bin Al-Shibh was charged in the Military Commission with offenses that carried the penalty of death. Although it is unclear whether those charges will be pursued or whether he will be similarly charged in a different forum, we fully expect the government to prosecute Mr. Bin Al-Shibh with offenses that could carry the death penalty.

Regardless of the forum in which Mr. Bin Al-Shibh is tried, evidence of his conditions of confinement will be relevant in assessing his competency, the reliability of any of his statements, and the reliability of any statements of other prisoners similarly held that the government plans to use against him. This evidence will also be highly relevant during any sentencing proceeding. It is exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and he will be entitled to it.

The CIA's secret prison facilities and the inquisition-like treatment meted out to its prisoners were a tragic, immoral and illegal period in our history that we all hope has come to an end. But its effects are enduring, especially on someone like Mr. Bin Al-Shibh, who, according to the ICRC report, lived through the horror chambers of secret prisons. Those buildings, interrogation cells, prisoner cells, shackles, water boards and other equipment must be preserved until such time as we have an adequate opportunity to document it and a court can determine the relevance and materiality of this evidence. As a criminal defendant, the Fifth, Sixth and Eighth Amendments to the United States Constitution will entitle him to discovery of exculpatory evidence.

Therefore, we are requesting that you preserve all the secret sites. By this letter, you are now on notice that attorneys for Mr. Bin Al-Shibh will be seeking discovery and inspection of this highly relevant evidence in whatever court Mr. Bin Al-Shibh finds himself. We have already lost the video tapes. We cannot lose the remaining tangible evidence of the actual prisons themselves.

Sincerely,

RICHARD COUGHLIN  
Federal Public Defender

CHESTER M. KELLER  
First Assistant  
Federal Public Defender

CANDACE HOM  
Assistant Federal Public Defender

cc: John Rizzo, CIA General Counsel (Acting)  
Eric Holder, Attorney General  
The White House, ATTN: Greg Craig, Esq.,  
White House Counsel  
Cmdr. Suzanne Lachalier, USN  
Lt. Richard Federico, USN

Sent: Thursday, April 23, 2009 4:14 PM

Subject: United States v Mohammed, et al-Prosecution Special Request for Relief-Extension of Time to File a Response to D-108-Defense Motion to Preserve CIA Black Sites

Judiciary,

Please pass the following special request for relief to the Military Judge:

The Prosecution respectfully requests that the Military Judge grant the Prosecution a thirty day extension of time (until 26 May 2009) to file a Response to the Defense Motion to preserve CIA Black Sites. Given the nature of the request and the agencies involved, this extension is necessary to allow the appropriate coordination with the various agencies. While this matter is pending, the Government will preserve the status quo with respect to the subject of this motion until the Military Judge considers this matter.

Respectfully submitted,

Clay Trivett